PD-1034-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/8/2021 3:06 PM
Accepted 3/9/2021 9:55 AM
DEANA WILLIAMSON
CLERK

No. PD-1034-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/9/2021
DEANA WILLIAMSON, CLERK

TERRY MARTIN, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Lubbock County, Trial Cause 2019-494,736
No. 07-19-00082-CR

* * * * *

STATE PROSECUTING ATTORNEY'S BRIEF ON THE MERITS

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State's Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Terry Martin.

- The trial judge was Hon. Drue Farmer, Presiding Judge of County Court at Law No. 2, Lubbock County, Texas.

- Counsel for Appellant at trial was Ruth Cantrell, Ruth Cantrell Law Office, 1106 6th Street, Lubbock, Texas 79424.

- Counsel for Appellant on appeal before the Court of Appeals and this Court is Lorna McMillion, Lubbock Private Defender's Office, P.O. Box 1267, 105 Clovis Road, Shallowater, Texas 79363.

- Counsel for the State at trial were Lubbock County Assistant Criminal District Attorneys Erin Van Pelt and Alan Burow, P.O. Box 10536, Lubbock, Texas 79408.

- Counsel for the State before the Court of Appeals was Jeffrey Ford, Assistant Criminal District Attorney, P.O. Box 10536, Lubbock, Texas 79408.

- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

STATUTES

Other Sources

No. PD-1034-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

TERRY MARTIN, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Lubbock County, Trial Cause 2019-494,736
No. 07-19-00082-CR

* * * * *

STATE PROSECUTING ATTORNEY'S
BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The plain language of the statute prohibiting gang members from carrying a handgun while traveling requires membership in a group that regularly associates to commit crime. This should not require proof of the defendant's commission of gang crimes.

STATEMENT REGARDING ORAL ARGUMENT

This Court did not grant argument.

STATEMENT OF THE CASE

Appellant was charged by information with unlawful carrying a weapon (UCW) by a criminal street gang member under TEX. PENAL CODE § 46.02(a-1)(2)(C).[1] A jury convicted him and assessed only a $400 fine.[2] On appeal, he argued § 46.02(a-1)(2)(C) was unconstitutional and the evidence was insufficient.[3] The court of appeals held his constitutional complaints were not preserved, agreed the evidence was insufficient, and rendered a judgment of acquittal.[4]

ISSUE GRANTED

> Does unlawful carrying a weapon by a gang member, TEX. PENAL CODE § 46.02(a-1)(2)(C), require proof the defendant was continuously or regularly committing gang crimes?

STATEMENT OF FACTS

Corporal Michael Macias observed Appellant commit several traffic violations on his motorcycle and pulled him over.[5] Appellant was wearing Cossack

---

[1] CR 14.

[2] CR 65, 70.

[3] App. COA Brief at 3-4.

[4] *Martin v. State*, No. 07-19-00082-CR, 2020 WL 5790424, *4 (Tex. App.—Amarillo, Sept. 28, 2020) (not designated for publication).

[5] 3 RR 14-15.

Motorcycle Club garb and admitted being a member.[6] He also had a handgun with him.[7] He was arrested and charged with UCW by a gang member.[8]

At trial, the State offered testimony that the Cossacks and Bandidos were engaged in a turf war and had a gunfight in 2015 at a Twin Peaks restaurant in Waco.[9] The State's motorcycle gang expert testified that 25 law enforcement agencies identified the Cossacks as a motorcycle gang.[10] He opined that, nationally, the Cossacks' "primary activities" are assaults, but also threats of violence, intimidation, and illegal firearms possession.[11] Groups would obtain permission from the Cossack

---

[6] 3 RR 16, 21, 29, 86, 130; 4 RR 28.

[7] 3 RR 21, 23.

[8] CR 8, 14.

[9] 3 RR 69-70, 91-92. The feud began when the Cossacks claimed the State of Texas as their territory by adding the label "Texas" to a curved patch (called a "rocker") on the bottom of their vests (called "cuts"). 3 RR 29, 75-76; 6 RR 21.

[10] 3 RR 89.

[11] 3 RR 72. The testimony on that point was as follows:

> Q. Are you familiar with the primary activities of the Cossacks motorcycle gang?
>
> A. I am.
>
> Q. What are those activities?
>
> A. Basically it's going to be assaults is the – is going to be the big one, threats of violence, intimidation, and illegal firearms possession.
>
> Q. All right. So they're known to engage in criminal activities on top of just riding motorcycles, fair to say?

national leadership to organize a local chapter.[12] Members paid dues to the national organization, earned a patch to wear on their vests upon obtaining full membership, and had to return Cossack insignia upon resignation or "excommunication."[13] The expert knew of at least one police report of Cossacks committing assaults in the Lubbock area where Appellant was stopped, although there had been no arrests from the incident.[14] He opined that Appellant was a Cossack member because (1) he admitted to Macias that he was, (2) he wore a Cossack vest and colors, and (3) other law-enforcement agencies identified him as a gang member because he had been detained with gang members on a gang-related offense.[15]

Appellant testified that he had been a member of the Cossacks for four years but believed they weren't a criminal street gang.[16] According to Appellant, a group known as the "one percent Cossacks" who did not "conform to society's rules and regulations" split from the main group.[17] He admitted being arrested during the

---

A. Yes.

[12] 3 RR 71.

[13] 6 RR 26-29 (SX 7: organization bylaws).

[14] 3 RR 73, 93-95.

[15] 3 RR 86.

[16] 4 RR 23 (belief they weren't a gang), 38 (member), 44 (years of membership).

[17] 4 RR 32-33.

Twin Peaks incident.[18] The charge (engaging in organized criminal activity) was later dismissed.[19] His best friend was one of seven Cossacks who died in the shooting, and he knew the others.[20] He added tattoos in their memory.[21] Appellant testified that there were six Cossacks in Lubbock, and they were mechanics and city employees, not criminals, although he acknowledged that law enforcement officers could not join.[22] He and the other Cossacks paid dues to a national organization.[23] They had common colors, a logo, and a motto.[24] At one time, he held the rank of Sergeant at Arms in the Dallas-area chapter.[25] According to the State's expert, a sergeant at arms guards the chapter president and enforces discipline among members.[26] Appellant testified that he and the other five Cossacks in Lubbock did not plot crimes together, and he denied personally assaulting anyone with other

---

[18] 4 RR 24.

[19] 3 RR 145-46; 4 RR 26; 6 RR 23 (SX 6: booking sheet).

[20] 4 RR 39.

[21] *Id.*

[22] 4 RR 28 (membership in Lubbock), 32 (none "criminal minded"), 35-36, 44 (membership not open to law enforcement); 5 RR 25-26 (same).

[23] 5 RR 6.

[24] 5 RR 6-7; SX 7 (bylaws).

[25] 3 RR 76-77 (gang expert); 5 RR 12, 15 (Appellant).

[26] 3 RR 76-77.

members.[27] He testified he did not participate in any bar fights or agree with other Cossacks to beat up Bandidos.[28] To his knowledge, no Cossacks had been convicted for the Twin Peaks incident.[29]

Appellant was convicted of gang-member UCW and fined $400.

The statutes at issue.

Under the UCW statute, a person commits an offense if he:

> intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:
> ….
> (2) the person is:
> ….
> (C) a member of a criminal street gang, as defined by Section 71.01.[30]

"Member" is not defined. Section 71.01 defines a criminal street gang as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities."[31]

---

[27] 4 RR 28.

[28] 5 RR 19-20.

[29] 4 RR 27.

[30] TEX. PENAL CODE § 46.02(a-1)(2)(C).

[31] TEX. PENAL CODE § 71.01(d).

Appellant's appeal: sufficiency to prove he was a criminal Cossack.

On appeal, Appellant raised numerous (unpreserved) facial and as-applied constitutional challenges to the gang-member UCW statute.[32] He did not complain that the evidence was insufficient to prove he was a member of the Cossacks or that the Cossacks were a criminal street gang. Instead he challenged whether the evidence showed he was a gang "member" for purposes of the statute. For this, he relied on the Fourteenth Court of Appeals's interpretation in *Ex parte Flores* that a "member" is one of the three or more persons who continuously or regularly associate in crime.[33] In short, although he was factually a Cossacks member, he wasn't legally one because the State didn't prove he was a criminal.

The court of appeals agreed: The State must prove he's one of the three or more criminal Cossacks.

After ruling Appellant's constitutional issues were unpreserved, the court of appeals moved onto sufficiency. It accepted *Ex parte Flores*'s interpretation of the statute without any discussion and held: "To be a gang member for purposes of

---

[32] App. First Amended COA Brief at 16-39 (14 points of error that statute violates equal protection, the right of association, the right to travel, and the 2nd Amendment, authorizes guilt by association, is overbroad, and is unconstitutionally vague).

[33] *Id.* at 40 (citing *Ex parte Flores*, 483 S.W.3d 632 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)).

prosecution under the statute, 'an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and must also continuously or regularly associate in the commission of criminal activities.'"[34] It reversed Appellant's conviction for insufficient evidence because it found the record "devoid of evidence…showing that [Appellant] associated in the commission of criminal activities."[35] It noted, "[t]he sole piece of evidence indicating that appellant was ever involved in criminal activity was the evidence of his presence at the Twin Peaks shooting."[36]

SUMMARY OF THE ARGUMENT

The court of appeals erred when it followed a decision by another court of appeals, *Ex parte Flores*, in interpreting what constitutes a criminal street gang "member" for purposes of UCW. *Ex parte Flores* departed from the plain language of the statute and foisted the requirements of the gang as a whole (continuously or regularly associating in crime) onto each individual member. The court of appeals went still further in seeming to require that a member actually commit crime, not

---

[34] *Martin*, 2020 WL 5790424, at *4 (quoting *Ex parte Flores*, 483 S.W.3d at 648).

[35] *Id.*

[36] *Id.*

just associate in its commission. It considered none of the constitutional challenges *Ex parte Flores* did. This Court can reject both of these courts' interpretations based on plain language without reaching out to resolve countless unpreserved constitutional challenges.

ARGUMENT

The *Ex parte Flores* interpretation.

Although not noted by the court of appeals in the instant case, *Ex parte Flores* was about the constitutionality of the gang-member UCW statute, not sufficiency. Flores's first argument was that the statute was overbroad because the definition of "criminal street gang" should be interpreted like this:

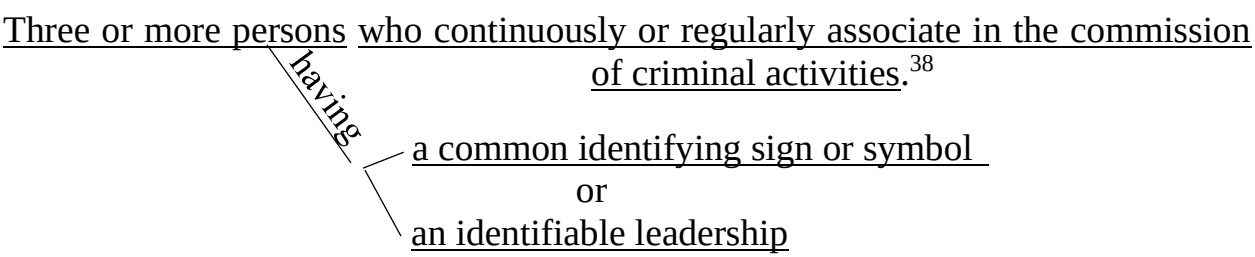
Three or more persons having
- a common identifying sign or symbol
- or
- an identifiable leadership who continuously or regularly associate in the commission of criminal activities.[37]

Not surprisingly, the Fourteenth Court of Appeals rejected this argument. Merely having a common identifiable symbol among three people (like the Boy Scouts) was

[37] *Ex parte Flores*, 483 S.W.3d at 643-44.

not enough to constitute a criminal street gang.

Instead, *Ex parte Flores* concluded the definition had to be read like this:



Even under this construction of the statute, Flores argued that the term "member" was overbroad because a member could be convicted even if he was uninvolved in or unaware of the gang's criminal activities.[39] In response, *Ex parte Flores* again undertook to construe the statute:

> The term "member" in section 46.02(a-1)(2)(C) derives its content from the definition of "criminal street gang" contained in Section 71.01(d). Read together, these provisions indicate that a gang "member" must be

---

[38] This interpretation is not absurd. *Id*. at 644. Plus, it follows subject-verb agreement. *Id*. at 644 n.6. If, as Flores contended, the "who continuously…" phrase modified "leadership," the verb in that clause would have been "associate*s*" since leadership is a singular, collective noun. While collective nouns can take the plural form if the collective acts as individuals (*e.g*., the jury are of different minds), that wouldn't help Flores since, even under his interpretation, the leadership is associating in a common endeavor, not acting as individuals. *See* Wayne Schiess, "Collective Nouns: Singular or Plural?" (available online at https://sites.utexas.edu/legalwriting/2017/06/05/collective-nouns-singular-or-plural/).

[39] *Ex parte Flores*, 483 S.W.3d at 645.

> one of the three or more persons who continuously or regularly associate in the commission of criminal activities.[40]

Construed this way, *Ex parte Flores* held, the statute was neither overbroad[41] nor unconstitutionally vague.[42]

Ex parte Flores's "1 of the 3 or more" gloss on the statute is contrary to its plain language.

In determining what gang membership for UCW means, two basic requirements are clear from the text of §§ 46.02(a-1)(2)(C) and 71.01(d): (1) the defendant must be a member of a gang and (2) the gang, among other things, must continuously or regularly associate in the commission of crime. But in holding that "a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities," *Ex parte Flores* and the court of appeals collapsed the two requirements into one. This is contrary to the statute's plain language.

---

[40] *Id.*

[41] *Id.*

[42] *Id.* at 646-47 ("So understood, the term 'member' is not so vague that people 'of common intelligence must necessarily guess at' what conduct is prohibited.") ("a correct construction of the statute removes any ambiguity in the term 'criminal street gang' and clarifies what conduct makes an individual a 'member' of the gang.").

In one sense the reduction seems intuitive: a member of a gang is someone who is in a gang and a gang is "three or more persons …who continuously or regularly associate in the commission of criminal activities." But saying that to be a member, a person must be "one of the three…who continuously or regularly associates…" conveys that each member must *individually* have this regular criminal association. This is unnecessarily restrictive.

Even for purposes of Engaging in Organized Criminal Activity, which requires committing an enumerated offense as a member of a criminal street gang, there is no requirement that the defendant be one of the three who also carries on this regular association in crime.[43] Both in its definition and its usage in the Organized Crime Chapter (Penal Code Ch. 71) and § 46.02, a "criminal street gang" is a collective body. By definition, it has a common sign or symbol or singular leadership.[44] Both § 71.02 and § 46.02(a-1)(2)(C) require membership in "a" "criminal street gang." These are not just three or more persons acting individually;

---

[43] Section 71.02 criminalizes the commission or conspiracy to commit certain offenses "as a member of a criminal street gang." TEX. PENAL CODE § 71.02(a); *Zuniga v. State*, 551 S.W.3d 729, 735 (Tex. Crim. App. 2018) (engaging in organized criminal activity as a criminal street gang member does not require "intent to establish, maintain, or participate" in a criminal street gang).

[44] TEX. PENAL CODE § 71.01(d).

together they form a single entity. And this group is what must "continuously or regularly associate in the commission of criminal activities," not the member. Keeping a two-step interpretation (being a member of a group + the group continuously or regularly associates in crime) preserves the legislature's chosen structure.

A contrary interpretation would produce strange results. For one, it would exclude the newly initiated, who would not qualify as members under the *Ex parte Flores* interpretation because their association isn't yet regular. Also, it is contrary to the nature of a criminal enterprise. Members commit crimes in the name of the organization. So even if the average gang member only randomly or sporadically participates in the support, planning, or execution of gang crimes, the gang as a whole still continuously or regularly associates in the commission of criminal activities.[45] Requiring that any individual's association in committing gang crimes be continuous or regular in order to be a "member" is at odds with how gangs operate and pose a threat to society.

---

[45] *See* Wesley F. Harward, *A New Understanding of Gang Injunctions*, 90 NOTRE DAME L. REV. 1345, 1348 (2015) ("Many criminal street gangs have hundreds, if not thousands, of members. As is to be expected in organizations of that size, membership is constantly changing with new members joining the gang and other members leaving.").

Although *Ex parte Flores* was wrong, the court of appeals was more so.

Since it was addressing the constitutionality of the statute in a pretrial writ, *Ex parte Flores* was not called on to apply its definition or explain what it meant to "associate" in criminal enterprise.[46] But the court of appeals in this case was. And it surpassed even *Ex parte Flores*'s disregard of plain language in requiring personal, direct participation in crime. The court of appeals did not acknowledge Appellant's four-year membership, monetary contributions from membership dues, or past leadership role. All of these things facilitated the Cossack's primary activities—that being committing assaults, according to the State's expert.[47]

The court of appeals instead looked only to his presence at the Twin Peaks shooting, explaining that this was the "sole piece of evidence indicating that appellant was ever involved in criminal activity."[48] And it *was* the only evidence he was physically and personally involved in a crime. But "associat[ing] in the commission of criminal activities" should be interpreted to mean partnering or

---

[46] *Ex parte Flores*, 483 S.W.3d at 645-48 (rejecting claim that "member" is vague and within arbitrary discretion of law enforcement to determine because statute required a member to "continuously or regularly associate in the commission of criminal activities" but not explaining what such association in committing crimes means).

[47] 3 RR 72.

[48] *Martin*, 2020 WL 5790424, at *4.

collaborating in crime. Restricting it to one's own actual commission of crime reads out the word "associate" in the definition of criminal street gang.

"Associate" is not defined by the statute. Webster's New Universal Unabridged Dictionary defines the intransitive verb as "to enter into union; unite" or "to keep company, as a comrade or intimate."[49] Merriam-Webster's first definition for the intransitive verb is "to come or be together as partners, friends, or companions."[50] Requiring members to physically come together to commit gang crimes would prevent a single perpetrator with financial backers or a fan club from constituting a gang. While this may align with colloquial notions of what a criminal street gang is, it also would exclude financial or technology crimes, which Section 71.02 expressly includes.[51] Perversely, the higher up in the organization that a defendant is, the more difficult it will be for the State to establish any "association" at all with other members, let alone one that is regular or continuous.[52] This

---

[49] Webster's New Universal Unabridged Dictionary, p. 90 (1992).

[50] merriam-webster.com/dictionary/associate.

[51] *See* TEX. PENAL CODE § 71.02(a)(6) (criminalizing the wholesale promotion of obscenity as a criminal street gang member or with intent to aid a combination); (8) (fraud), (10) (money laundering and insurance fraud), (18) (wiretapping), (19) (Tax Code offenses).

[52] In cases like *Medrano v. State*, where the defendant acted as treasurer and provided the weapons that killed the gang's victims, the proof may fail. *Medrano v. State*, No. AP-75,320, 2008 WL 5050076 (Tex. Crim. App. Nov. 26, 2008) (not designated for

compounds the problem of *Ex parte Flores*'s interpretation because it would grant immunity to members who provided essential resources for the gang's operations but seldom associate with others. To hold that high-level leaders and organizers are not in the gang they lead or finance would be absurd.

The better interpretation is that "associate in the commission of criminal activities" means partnering in the gang's effort to commit crimes, as an accomplice or conspirator would.[53] This may be what *Ex parte Flores* had in mind. After all, members are generally members (and remain so) because they aid in some form or fashion with the group's activities. This interpretation also substantially overlaps with the requirement for "combination," *i.e.*, that participants "collaborate in carrying on criminal activities."[54] While the Legislature is generally presumed to have meant something else when it uses different terminology,[55] in this case, it

---

publication). Also, it would make prosecuting Directing Activities of Criminal Street Gangs, TEX. PENAL CODE § 71.023, more difficult since it would require proof that those carrying out the crime be doing so regularly and in each other's presence. Ironically, the better a leader is at directing the activities of members who can work independently, the less culpable the leader becomes, since the leader's own indirect actions won't factor in.

[53] *See* TEX. PENAL CODE § 7.02.

[54] TEX. PENAL CODE § 71.01(a).

[55] Antonin Scalia and Bryan Garner, "25. Presumption of Consistent Usage," READING LAW, p. 170 (2012) (describing logical basis of the canon: "where the document has used

makes more sense that the definitions of "combination" and "criminal street gang" (using words appropriate to each) parallel one another, since each is a path to commission of § 71.02 and punished the same.[56]

A plain-language interpretation of the statutes requires neither a defendant's own personal criminal conduct nor his continuous or regular association in the commission of crime. The State need not have proven that Appellant, individually, associated in the commission of criminal activities, as long as the Cossacks did and he was a member. Because he did not contest the sufficiency of either of these actual elements and the court of appeals's evidentiary-sufficiency holding relied solely on its flawed understanding of the statute, Appellant's conviction should be affirmed.

What about the constitutionality of the statute?

This Court need not delve into a full-blown constitutional analysis of the statute merely because it has to construe the statute as part of its sufficiency review. Appellant raised a sufficiency issue and the court of appeals addressed a sufficiency

---

one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.").

[56] *See* TEX. PENAL CODE § 71.02; *Zuniga*, 551 S.W.3d at 735; *see also* TEX. CIV. PRAC. & REM. CODE § 125.062 (either a combination or criminal street gang can constitute a *per se* public nuisance as long as it "continuously or regularly associates in gang activities").

claim. It refused to address his constitutional challenges to the statute because he did not object at trial, and thus it did not decide a constitutional issue.

This Court need only satisfy itself that its plain-language interpretation will not create grave doubts about the statute's constitutionality. The constitutional-doubt canon of construction dictates that, given two possible interpretations, a court should choose the one that avoids placing the statute's constitutionality in doubt.[57] Here, although *Ex parte Flores* arrived at its reductive interpretation while answering overbreadth and vagueness challenges, it did not indicate that its interpretation was necessary to avoid constitutional questions.[58] Instead, it believed it was giving these two statutes their only reasonable interpretation when "[r]ead together."[59] As explained above, this was wrong. But it also is not the case that a plain reading of the statutes (requiring membership in a group that, as a whole, continuously or regularly partners in the commission of crime) raises serious constitutional

---

[57] Scalia and Garner, at p. 247, 249 (suggesting that the basis for this canon is to minimize the chances that a court will have to confront and contradict the legislative branch).

[58] *Compare* 483 S.W.3d at 644 (referencing avoiding unconstitutional result with regard to whether the "who continuously…" clause modified "persons" or "leadership") *with* 645 (reading 46.02(a-1)(2)(C) and 71.01(d) together to decide members must be one of the three).

[59] *Id*. at 645.

questions. Without definitely ruling on all possible constitutional challenges (or even the 14 Appellant briefed), this Court can assure itself that this plain-language interpretation is constitutional.

There is no grave doubt that the statute could be overbroad.

For statutes (like this one) that regulate conduct and not pure speech, "the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[60] Here, it is difficult to identify instances when the statute would ever operate unconstitutionally, much less that it would do so substantially. Appellant is wrong when he proposes that organizations can become "criminal street gangs" as long as any three people in the organization commit crimes together.[61] Again, the statute requires that the three or more persons constitute a single entity continuously or regularly associating in committing crimes. This undermines many of Appellant's constitutional complaints.

The gang-member UCW statute does not tread on important First Amendment rights. It does not prohibit advocacy of gang activity or even

---

[60] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[61] App. First Amended COA Brief at 23, 33.

membership in a gang.[62] It prohibits carrying a weapon on one's person in a vehicle when a gang member. Carrying a weapon is not itself understood as inherently expressive conduct.[63] To the extent a right to association has been recognized in the First Amendment, it has been for the purpose of engaging in other express First-Amendment freedoms, *i.e.*, speech, assembly, petition for the redress of grievances, and exercise of religion.[64] The social contacts of gang members are not protected

---

[62] *Cf. De Jonge v. Oregon*, 299 U.S. 353, 362 (1937) (contrasting De Jonge's prosecution for participating in a Communist Party meeting with laws that criminalize the use of force and violence to effect revolutionary change in government); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (speech integral to criminal conduct is not protected). Appellant's argument that those who don't share their organization's illicit goals pose no threat (App. First Amended COA Brief at 18-19) has been undermined by more recent caselaw. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 29 (2010) (upholding statute prohibiting material support to foreign terrorist organizations despite claim that plaintiffs only aimed to support group's legitimate purposes, in part because such organizations did not keep terrorist and political goals separate, and noting that statute did not prohibit mere membership or "vigorously promoting and supporting the political goals of the group").

[63] *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) ("Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it.").

[64] *See, e.g., Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) (recognizing that the right of association as an extension of the First Amendment because "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others."); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 431 (1963) (Virginia's law against fomenting litigation intruded on NAACP's right to associate as a form of political expression).

within this recognized right.[65] Nor are they the kind of selective, intimate relationships that are protected.[66] Even if one could imagine the statute potentially intruding on speech (gang members participating in a protest parade where they also feel the need for self-protection within their vehicles), this statute hardly sweeps within it broad swaths of constitutionally protected endeavors. These claims can best be addressed in as-applied challenges as they occur (and are preserved).

There is no grave doubt that the statute is unconstitutionally vague.

Nor is the statute unconstitutionally vague without *Ex parte Flores*'s interpretation. Although "member" is not defined, it does not need to mean "one of the three active participants" for people of ordinary intelligence to understand what it means and avoid arbitrary and discriminatory enforcement.[67] As the definition

---

[65] *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (rejecting overbreadth claim for anti-loitering ordinance that required those in the company of a gang member to disperse if their purpose was not apparent to an officer); *see also United States v. Choate*, 576 F.2d 165, 181 (9th Cir. 1978) ("the practice of associating with compatriots in crime is not a protected associational right.").

[66] *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (fraternal organization).

[67] *See Martinez v. State*, 323 S.W.3d 493, 507 (Tex. Crim. App. 2010) (addressing vagueness challenge concerning injunction on criminal street gang activity).

recognizes, criminal street gang membership typically involves signs and symbols that are "identifying."[68] As this Court reiterated in *Martinez v. State:*

> The making of hand gang signs and the wearing of gang clothing are a primary feature of street gangs. A street gang is identified first and foremost through its hand signs and attire; it puts the public, and most of all, rival gangs, on notice of its existence and presence.[69]

Moreover, gangs generally do not tolerate posers. Thus the problem of people being wrongly identified as criminal street gang members is largely self-regulated. Officers, also, are highly trained to spot gang affiliation, as *Martinez* reiterated when it rejected a similar vagueness claim regarding an injunction on activities of criminal street gang.[70] Although Appellant repeatedly voiced concern in his court of appeals brief that law enforcement could seize upon any "scorned" or "disfavored" group and label it a criminal street gang, this would not be due to a lack of criteria in the statute—the group has to regularly (if not continuously) associate in the commission of crime.

---

[68] TEX. PENAL CODE § 71.01(d).

[69] *Martinez,* 323 S.W.3d at 506 (footnote omitted).

[70] *Id*. at 508. *See also* TEX. CODE CRIM. PROC. art. 67.051 (providing for database to compile information by law enforcement relating to criminal street gangs), art. 67.054 (setting out submission criteria for a person's inclusion in database), art. 67.201 (right to determine if information about oneself or one's child is being collected), arts. 67.202, 67.203 (right to review and judicial review).

Even if there were constitutional concerns, *Ex parte Flores*'s solution is the wrong one.

Appellant's real concern appears to be that he is being punished (and prevented from exercising his 2nd Amendment and other rights) without proof that he himself committed crimes and without being aware that the Cossacks did.[71] This is at most a problem of culpable mental state. It shouldn't be fixed with an interpretation that requires an additional actus reus. Although this Court has not yet determined what elements of § 46.02(a-1)(2)(C) the intentional, knowing, or reckless mental state applies to, since gang membership is what makes traveling with a handgun illegal, the mental state may well extend all the way to the kind of organization one has joined.[72] If the defendant must be at least reckless about the criminal nature of the group he is a member of, there would be no need to also require

---

[71] *See, e.g.*, App. First Amended COA Brief at 23, 28, 30.

[72] *See State v. Ross*, 573 S.W.3d 817, 824 (Tex. Crim. App. 2019) ("'where otherwise innocent conduct becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances.'") (quoting *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)); *but see Celis v. State*, 416 S.W.3d 419, 427-28 (Tex. Crim. App. 2013) (plurality op.) (finding falsely holding oneself out as a lawyer did not require culpable mental state as to the defendant's failure to comply with licensing requirements, in part, because the practice of law is a highly regulated endeavor and duty to know and comply with regulations should fall on those holding themselves out as lawyers for profit).

that he individually associate in the commission of criminal activities on a continuous or regular basis.

Again, this Court need not definitively rule on the culpable mental state issue. Appellant did not raise it; nor did the court of appeals decide it. Plus, Appellant's past leadership role, years of membership, and presence during a deadly shootout with a rival gang do not suggest his is a case in which it would matter anyhow. He was a criminal-street-gang member both factually and legally, and thus his conviction should be upheld.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and affirm Appellant's conviction.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 4,954 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of March 2021, the State Prosecuting Attorney's Brief on the Merits was served electronically on the parties below.

Jeff Ford
Assistant Criminal District Attorney
Lubbock County Criminal DA's Office
jford@lubbockcda.com

Lorna McMillion
Lubbock Private Defender's Office
Counsel for Terry Martin
lorna@lornalaw.com

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Stacey Soule on behalf of Emily Johnson-Liu
Bar No. 24032600
information@spa.texas.gov
Envelope ID: 51257460
Status as of 3/9/2021 9:56 AM CST

Associated Case Party: Terry Martin

Name	BarNumber	Email	TimestampSubmitted	Status
Lorna Bueno		lorna@lornalaw.com	3/8/2021 3:06:28 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jeff Ford		jford@lubbockcda.com	3/8/2021 3:06:28 PM	SENT
Lorna McMillion		lorna@lornalaw.com	3/8/2021 3:06:28 PM	SENT